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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1426

BOBBY L. CARGAL,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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PART I

OPINION BELOW

The decision sought to be reviewed by this court is reported at 144 Ga. App. 238 (241 S.E. 2d 8).

QUESTIONS RAISED

1. Whether jury instructions on scienter that required the State to prove beyond a reasonable doubt that the accused had knowledge of the obscene nature of the magazines sold by him, either actual or constructive, and that a person has constructive knowledge of the obscene content if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material, were sufficient to meet constitutional minimum standards.

2. Whether the magazine *Little Girls Together* and *Sixty-Nine* are obscene as a matter of law and therefore not protected expression under the First and Fourteenth Amendments to the Constitution of the United States.

PART II

ARGUMENT AND CITATIONS OF AUTHORITY

A.

JURY INSTRUCTIONS ON SCIENTER THAT REQUIRED THE STATE TO PROVE BEYOND A REASONABLE DOUBT THAT THE ACCUSED HAD KNOWLEDGE, EITHER ACTUAL OR CONSTRUCTIVE, AND THAT CONSTRUCTIVE KNOWLEDGE IS KNOWLEDGE OF FACTS WHICH WOULD PUT A REASONABLE AND PRUDENT PERSON ON NOTICE AS TO THE SUSPECT NATURE OF THE MATERIAL, WERE SUFFICIENT TO MEET CONSTITUTIONAL MINIMUM STANDARDS.

Section 26-2101 of the Criminal Code of Georgia provides, in part, as follows:

> "(a) a person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, *knowing the obscene nature thereof*, or offers to do so, or possesses such material with the intent to do so, provided that the word 'knowing', as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and *a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material . . .*" (Emphasis added)

The trial court charged the jury on scienter according to the provisions of the Georgia statute, supra, and this charge is in keeping with a line of cases on the question of scienter in obscenity cases dating back to the year 1896 when the court held that the person charged with the offense of mailing obscene material must know *or have notice of the contents* of the material.

> "The inquiry, in proceedings under Rev. Stat. §3893, is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail *by one who knew or had notice at the time of its contents*, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails." (Emphasis added) *Rosen v. United States*, 161 U.S. 29 (1896).

Rosen did not require the accused to have knowledge of the obscenity of the material, only *notice of its contents.*

". . . Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.

We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be. . ." *Smith v. California*, 361 U.S. 147, 154 (1959).

The Georgia statute, 26-2101 supra, is very similar and compares to New York statutes dealt with by the court in *Mishkin v. New York*, 383 U.S. 502 (1966) and *Ginsberg v. New York*, 390 U.S. 629 (1968).

The *Mishkin* case pointed out that the New York Court of Appeals had construed Section 1141 of the New York Penal Law to require the "vital element of scienter," and it defined the required mental element in these terms:

> "a reading of the statute (§1141) as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised . . ."

Section 26-2101 of the Georgia Code requires "knowledge of facts which would put a reasonable and prudent person on notice," while Section 1141 of the New York Penal Law requires the accused to be "in some manner aware."

The statute dealt with in *Ginsberg* defined knowingly as "knowledge" of, or "reason to know" of, the character and content of the material.

Neither *Mishkin* nor *Ginsberg* requires actual knowledge. Both cases were reviewed and followed in *Hamling v. United States*, 418 U.S. 87 (1974), where the court construed 18 U.S.C. §1461, and held:

> "To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. §1461 nor by the Constitution."

In the case of *Kuhns v. California*, _____U.S._____, 97 S.Ct. 2938, this court denied petition for certiorari to review jury instructions based upon the California obscenity statute which defines "knowingly" as "(be) aware of the character of the matter . . ." *California v. Kuhns*, 61 Cal. App. 3d 735, 132 Cal. Rptr. 725, 737 (1976).

In the case of *Nash v. United States*, 229 U.S. 373 (1913), the court said:

> "In many instances a man's fate depends upon his rightly estimating, that is as the jury subsequently estimates it, some matter of degree, and there is no constitutional difficulty in the way of enforcing the criminal provisions of the Sherman Anti-Trust Act on the ground of uncertainty as to the prohibitions."

Whenever the law draws a line, there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk. *Nash v. United States*, supra; *United States v. Wurzbach*, 280 U.S. 396, 399 (1930). One who goes perilously close to an area of proscribed conduct shall take the risk that he may cross that line. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340.

In summary, on the question of scienter, the Georgia law requires and the jury was instructed that the State must prove, as a bare minimum, that the petitioner had knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. No more has ever been required. "Notice of its contents" is required by *Rosen v. United States*, supra; "in some manner aware" was sufficient in *Mishkin v.*

New York, supra; "reason to know" was sufficient in *Ginsberg v. New York*, supra; "be aware of the character of the matter" was sufficient in *Kuhns v. California*, supra; eyewitness testimony that the appellant perused the book is not necessary, *Smith v. California*, supra; and proof of knowledge of the legal status of the material is not required, *Hamling v. United States*, supra.

The precise scienter question raised by the Petitioner herein has been presented to the court in four cases previously in *Ballew v. Georgia*, 435 U.S. _____ (1978) (No. 76-761. Decided March 21, 1978); *Robinson v. Georgia*, 435 U.S. _____ (1978) (No. 77-915. Decided April 24, 1978); *Sewell v. Georgia*, 435 U.S. _____ (1978) (No. 76-1738. Decided April 24, 1978); and *Teal v. Georgia*, 435 U.S. _____ (1978) (No. 77-790. Decided April 24, 1978).

Ballew, supra, was reversed on the Five-person jury issue and remanded for further proceedings not inconsistent with the court's opinion which did not reach the scienter issue.

In *Robinson*, supra, the judgment was vacated and the case was remanded to the Court of Appeals of Georgia for further consideration in light of *Ballew v. Georgia*, and the scienter issue was not dealt with by the majority.

In *Sewell* and *Teal*, the appeals were dismissed for want of substantial federal question. Since no substantial federal question was raised in *Sewell* and *Teal*, and since the scienter issue raised in each of those cases were precisely the same as that presented by the Petitioner herein, it follows that the scienter issue presented by him raises no substantial federal question.

B.

THE MATERIALS INVOLVED HERE ARE OBSCENE AND ENTITLED TO NO PROTECTION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

In a review of the magazines *Little Girls Together* and *Sixty-Nine*, the court will find not only nudity and lewd exhibition of the genitals by both males and females, but there are also explicit depictions of ultimate sexual acts. Petitioner contends that these depictions do not constitute hard core pornography, and in support of these contentions, appellant cites cases in which convictions were reversed by this court. With the exception of *Jenkins v. Georgia*, 418 U.S. 153 (1974), all the cases cited by the Petitioner were decided during the period between *Roth v. United States*, 354 U.S. 476 (1957) and *Miller v. California*, 413 U.S. 15 (1973); a period when no majority of the court could agree on a standard to determine what constitutes obscene, pornographic material subject to regulations under the States' police power, and at which time convictions were reversed by the court summarily.

> "Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. See, e.g., *Redrup v. New York*, 386 U.S. at 770-771, 87 S.Ct. at 1415-1416. We have seen 'a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.' *Interstate Circuit, Inc. v. Dallas*, 390 U.S., at 704-705, 88 S.Ct. at 1314 (Harlan, J., concurring and dissenting)." . . . *Miller v. California*, 413 U.S. 15, 22, 88 S.Ct. 2607, 2614.

"In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. *Redrup v. New York*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed. 2d 515 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* 'policy'. See *Walker v. Ohio*, 398 U.S. 434-435, 90 S.Ct. 1884, 26 L.Ed. 2d 385 (1970) (dissenting opinions of Burger, C.J., and Harlan, J.). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." *Miller v. California*, 413 U.S. 15, 88 S.Ct. 2607, 2614 (Footnote 3).

In *Jenkins v. Georgia*, supra, the film "Carnal Knowledge" was in question and the scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. Such is not the case in the magazine in question, for there the camera does focus on the bodies of the participants.

The Respondent contends that the magazines are hard core pornography and obscene material when judged by the guide lines established in *Miller v. California*, supra, and the Georgia Obscenity statute, Code Section 26-2101, which is patterned after the *Miller* case.

CONCLUSION

For all the foregoing reasons, Respondent urges this Court to decline to issue the Writ of Certiorari in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Mail three (3) copies of the foregoing Brief of Respondent in Opposition to the Petition for Writ of Certiorari with first class postage prepaid, addressed to Robert Eugene Smith, Esquire, 1409 Peachtree Street, N.E., Atlanta, Georgia 30309, Attorney for Petitioner.

This _____ day of May, 1978.

LEONARD W. RHODES
Counsel for Respondent